

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF COMMERCE

In the Matter of the Residential Building
Contractor License of Thomas Joseph
Nicholl, doing business as Nicholl
Construction, doing business as
Northern Roofing

**FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDATION**

The above-entitled matter came on for a prehearing conference before Administrative Law Judge Barbara L. Neilson on December 4, 2002, at 1:30 p.m. at the Office of Administrative Hearings in Minneapolis, Minnesota. Michael J. Tostengard, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2130, appeared on behalf of the Department of Commerce ("the Department"). There was no appearance by or on behalf of the Respondent, Thomas Joseph Nicholl, doing business as Nicholl Construction, doing business as Northern Roofing, 9197 Davenport Street N.E., Blaine, Minnesota 55428. The record closed at the conclusion of the hearing on December 4, 2002.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Commerce will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact the office of the Commissioner of Commerce, 85 East Seventh Place, 5th Floor, St. Paul, Minnesota 55101 (telephone no. 651-296-2594), to ascertain the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

STATEMENT OF ISSUE

The issue in this case is whether the Respondent has engaged in unlicensed residential building contractor, remodeler, or roofer activity in violation of Minn. Stat. §§ 326.84, subds. 1 and 1b, and 326.842 by contracting with customers without a license or certificate of exemption; whether the Respondent has engaged in a fraudulent, deceptive, or dishonest practice in violation of Minn. Stat. § 326.91, subd. 1(2), by fraudulently using the license number of a licensed contractor to solicit work, offering a cancelled insurance certificate to a customer in the process of procuring a contract knowing that the policy was not in force, and performing construction work on the homes of customers without obtaining applicable local building permits and inspections; whether the Respondent has performed negligently or in breach of contract in violation of Minn. Stat. § 326.91, subd. 1(4), by failing to install ice and water shields and secure roof vents in accordance with code and common building practices, failing to perform work within the time specified, and failing to complete work; whether the Respondent violated a 1999 Cease and Desist Order issued by the Department in violation of Minn. Stat. § 326.91, subd. 1(5), by contracting to roof and remodel homes and perform multiple skill trades; and whether the Respondent failed to refund a customer's down-payment as promised and thus is incompetent, untrustworthy, or financially irresponsible, in violation of Minnesota Stat. § 326.91, subd. 1(6); and, if so, whether the Respondent's residential building contractor license should be revoked or suspended or whether the Respondent is otherwise subject to discipline and/or civil penalties pursuant to Minn. Stat. §§ 45.027, subds. 6-7, and 326.91.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. As a result of a previous investigation, the Respondent is the subject of a Cease and Desist Order issued by the Department on September 17, 1999. The Cease and Desist Order prohibits the Respondent from engaging in work in Minnesota that would require a residential contractor, remodeler, or roofer license.

2. The Notice of and Order for Hearing, Order for Prehearing Conference, and Statement of Charges in this matter was served upon the Respondent by certified mail on October 11, 2002, at his last known address: 9197 Davenport Street N.E., Blaine, MN 55428. The envelope was returned to the Department with a notation that the Respondent had moved and left no address and that the Postal Service was thus unable to forward the envelope to the Respondent.

3. On November 1, 2002, the Office of the Commissioner was served by certified mail with a copy of the Notice of and Order for Hearing, Order for Prehearing Conference, and Statement of Charges. An Affidavit of Compliance was filed by the Department on November 4, 2002. Service of process on the Respondent in this matter thus has been accomplished by compliance with the provisions of Minn. Stat. § 45.028.

4. The Notice of and Order for Hearing, Order for Prehearing Conference, and Statement of Charges served on the Respondent contained the following informational notice:

If Respondent fails to attend or otherwise appear at any prehearing conference, settlement conference, or hearing in this matter without the prior consent of the judge or fails to comply with any interlocutory order of the judge after having been served with a copy of this Order, Respondent shall be deemed in default and the allegations or issues set forth herein may be deemed proved, and Respondent's residential building contractor, remodeler, and/or roofer license may be revoked or suspended, Respondent may be censured and/or a civil penalty may be imposed against Respondent without further proceedings.

(Emphasis in original.)

5. The Respondent did not file any Notice of Appearance with the Administrative Law Judge or make any request for a continuance or any other relief. The Respondent did not appear at the hearing scheduled for December 4, 2002, or have an appearance made on his behalf. He also did not contact the Administrative Law Judge between December 4, 2002, and the date on which this Report was issued.

6. Because the Respondent failed to appear at the hearing in this matter, he is in default. Pursuant to Minn. R. 1400.6000, the allegations contained in the Notice of and Order for Hearing, Order for Prehearing Conference, and Statement of Charges are hereby taken as true and incorporated into these Findings of Fact.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Commerce have jurisdiction over this matter pursuant to Minn. Stat. §§ 14.50, 45.027, and 326.91.

2. The Notice of Hearing issued by the Department was proper and the Department has fulfilled all relevant substantive and procedural requirements of law and rule.

3. The Respondent, having made no appearance at the hearing, and not requesting any continuance or relief, is in default. Pursuant to Minn. Rules part 1400.6000, the allegations contained in the Notice of and Order for Hearing, Order for Prehearing Conference, and Statement of Charges are hereby taken as true.

4. The Respondent has violated Minn. Stat. §§ 326.84, subds. 1 and 1b, 326.842, and 326.91, subd. 1(2), (4), (5), and (6). The Respondent is subject to discipline and/or civil penalties pursuant to Minn. Stat. §§ 45.027, subds. 6-7, and 326.91.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Commissioner of Commerce take disciplinary action against the residential building contractor license of Thomas Joseph Nicholl, doing business as Nicholl Construction, doing business as Northern Roofing, and impose an appropriate civil penalty.

Dated: December 20, 2002

S/Barbara L. Neilson

BARBARA L. NEILSON

Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law. If the Commissioner fails to issue a final decision within 90 days of the close of the record under Minn. Stat. § 14.61, this report becomes a final decision. In order to comply with Minn. Stat. § 14.62, subd. 2a, the Commissioner must then return the record to the Administrative Law Judge within 10 working days to allow the Judge to determine the discipline to be imposed.

Reported: Default.